Kempadang Bersatu Sdn Bhd v Perkayuan OKS No 2 Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 03(f)-1–01 OF 2017(D)
ZULKEFLI PCA, SURIYADI, HASAN LAH, ZAINUN ALI AND AZIAH ALI FCJJ
7 NOVEMBER 2017

Civil Procedure — Judgments and orders — Whether order of High Court judge was appealable — Judge set aside registrar's decision on assessment of damages and ordered damages to be reassessed before a different registrar — Whether judge's order was a 'ruling' as described in s 3 of the Courts of Judicature Act 1964 ('the CJA') or caught by the exclusion clause of the word 'decision' thereunder — Whether judge issued the order in the course of hearing of the appeal or after — Whether judge's order was appealable under s 67(1) of the CJA read together with s 3 of the CJA

Following the trial of a civil suit between the parties, the High Court gave judgment in favour of the appellant and ordered the deputy registrar to assess the damages payable by the respondent to the appellant. The deputy registrar assessed damages at RM303,627.10. The respondent applied to set aside the award. The application was dismissed by the deputy registrar. That decision was upheld by the judge-in-chambers on appeal. On further appeal by the respondent, the Court of Appeal ('COA') allowed the appeal in part, narrowed down the scope of damages that the appellant was entitled to and ordered the damages to be re-assessed accordingly. When the matter came up again before the deputy registrar for the re-assessment, the appellant's claim for damages was dismissed on the ground that it had not been proven. The judge-in-chambers ('the JC') allowed the appellant's appeal, set aside the deputy registrar's decision for failing to abide by the COA's order and ordered that a different deputy registrar assess the damages again. Aggrieved by the decision, the respondent appealed to the COA. Before the COA, the appellant argued that the JC's decision was non-appealable as it was not one that finally determined the rights of the parties as provided under s 3 of the Court of Judicature Act 1964 ('the CJA'). The COA, however, disagreed and held that the JC's order was appealable. The COA allowed the respondent's appeal, set aside the JC's order and awarded nominal damages of RM10,000 to the appellant. The COA held that since the appellant had not used the opportunity it had before the deputy registrar to prove its damages, there was no basis for the JC to order a reassessment of damages before a different registrar. The COA opined that since the JC agreed with the deputy registrar that the appellant had not proved its damages but felt that some amount of damages was payable, he should have allowed the appeal in part and granted the appellant nominal damages. The

A appellant was granted leave to appeal to the Federal Court against the COA's decision on the question whether the JC's order remitting the case back to the deputy registrar for reassessment of damages was a final order which was appealable.

B **Held,** unanimously answering the leave question in the affirmative and dismissing the appeal:

(1) The JC's order remitting the case to a different deputy registrar for reassessment of damages was not a ruling as described in s 3 of the CJA. C It was not caught by the exclusion clause of the word 'decision' in s 3 of the CJA and was therefore appealable. In view of s 67(1) of the CJA read together with s 3 of the CJA, the respondent's appeal to the COA against the JC's decision was competent and properly brought (see paras 44, 58 & 60).

D (2) The JC's order remitting the matter to a different registrar for reassessment of damages was issued at the end of the hearing of the appellant's appeal. It was not issued in the course of the hearing of the appeal. The High Court's order showed that after hearing both parties, the JC proceeded to dispose of the appellant's appeal and set aside the E registrar's decision on assessment of damages (see para 57).

(3) The COA was right in finding that the JC ought to have allowed the appellant's appeal in part by awarding nominal damages (see para 59).

F **[Bahasa Malaysia summary**

Berikutan perbicaraan guaman sivil antara pihak-pihak, Mahkamah Tinggi memberi penghakiman memihak kepada perayu dan memerintahkan timbalan pendaftar untuk menilai ganti rugi yang kena dibayar oleh responden kepada perayu. Timbalan pendaftar menilai ganti rugi sebanyak G RM303,627.10. Responden memohon untuk mengetepikan award. Permohonan tersebut telah ditolak oleh timbalan pendaftar. Keputusan tersebut dikekalkan oleh hakim dalam kamar atas rayuan. Atas rayuan selanjutnya oleh responden, Mahkamah Rayuan ('MR') membenarkan sebahagian rayuan tersebut, mengecilkan skop ganti rugi yang perayu berhak H kepada dan memerintahkan ganti rugi untuk dinilai semula dengan sewajarnya. Apabila perkara tersebut muncul semula di hadapan timbalan pendaftar untuk penilaian semula, tuntutan perayu untuk ganti rugi ditolak atas alasan ia belum terbukti. Hakim dalam kamar ('PK') membenarkan rayuan perayu, mengetepikan keputusan timbalan pendaftar kerana tidak I mematuhi perintah MR dan memerintahkan supaya timbalan pendaftar yang berbeza menilai semula ganti rugi tersebut. Terkilan dengan keputusan tersebut, responden merayu kepada MR. Di hadapan MR, perayu berpendapat bahawa keputusan PK tidak boleh dirayu kerana ia bukanlah satu yang akhirnya menentukan hak-hak pihak-pihak sebagaimana yang diperuntukkan

di bawah s 3 Akta Mahkamah Kehakiman 1964 ('AMK'). Walau bagaimanapun, MR tidak bersetuju dan memutuskan bahawa perintah PK boleh dirayu. MR membenarkan rayuan responden, mengetepikan perintah PK dan mengaward ganti rugi nominal sebanyak RM10,000 kepada perayu. MR memutuskan bahawa oleh kerana perayu tidak menggunakan peluang yang ada di hadapan timbalan pendaftar untuk membuktikan ganti ruginya, tidak ada asas bagi PK untuk memerintahkan penilaian semula ganti rugi di hadapan pendaftar yang berbeza. MR berpendapat bahawa oleh kerana PK bersetuju dengan timbalan pendaftar bahawa perayu tidak membuktikan ganti ruginya tetapi merasakan bahawa sejumlah ganti rugi dibayar, beliau sepatutnya membenarkan sebahagian rayuan tersebut dan memberikan perayu ganti rugi nominal. Perayu telah diberikan kebenaran untuk merayu kepada Mahkamah Persekutuan terhadap keputusan MR mengenai persoalan sama ada perintah PK meremit semula kes tersebut kepada timbalan pendaftar untuk penilaian semula ganti rugi adalah perintah akhir yang boleh dirayu.

Diputuskan, sebulat suara menjawab soalan kebenaran dalam afirmatif dan menolak rayuan:

(1) Perintah PK yang meremit kes tersebut kepada timbalan pendaftar yang berbeza untuk menilai semula ganti rugi bukan keputusan seperti yang dinyatakan dalam s 3 AMK. Ia tidak ditangkap oleh klausa pengecualian perkataan 'keputusan' dalam s 3 AMK dan oleh itu boleh dirayu. Memandangkan s 67(1) AMK dibaca bersama-sama dengan s 3 AMK, rayuan responden kepada MR terhadap keputusan PK adalah kompeten dan dihadapkan dengan betul (lihat perenggan 44, 58 & 60).

(2) Perintah PK meremit perkara tersebut kepada pendaftar yang berbeza untuk penilaian semula ganti rugi dikeluarkan pada akhir pendengaran rayuan perayu. Ia tidak dikeluarkan semasa pendengaran rayuan tersebut. Perintah Mahkamah Tinggi menunjukkan bahawa selepas mendengar kedua-dua pihak, PK terus melupuskan rayuan perayu dan mengetepikan keputusan pendaftar mengenai penilaian ganti rugi (lihat perenggan 57).

(3) MR adalah betul dalam menemukan bahawa PK sepatutnya membenarkan sebahagian rayuan perayu dengan mengaward ganti rugi nominal (lihat perenggan 59).]

Notes

For cases on judgments and orders in general, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5449–5890.

Cases referred to

Ahmad Zubair @ Ahmad Zubir bin Hj Murshid v PP [2014] 6 MLJ 831, FC (refd)

Christopher ak Bandi @ Josny v Tumbung ak Nakis & Anor (Jamil bin Sindi, third party) [2016] 4 MLJ 100, CA (refd)
Dato' Seri Anwar Ibrahim v PP [2010] 6 MLJ 585; [2010] 9 CLJ 625, FC (refd)
Datuk Seri Tiong King Sing v Datuk Seri Ong Tee Keat & Anor [2015] 1 MLJ 847, CA (refd)
Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors [1985] 2 MLJ 35, SC (refd)
Hong Leong Finance Bhd v Low Thiam Hoe and another appeal [2016] 1 MLJ 301; [2015] 8 CLJ 1, FC (refd)
Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor [2018] 2 MLJ 590, FC (refd)
Mulpha International Bhd & Ors v Mula Holdings Sdn Bhd & Ors and other appeals [2017] MLJU 445, CA (refd)
Pentadbir Tanah Kuala Selangor lwn Maybank Islamic Berhad (Menteri Besar Selangor, pencelah) dan lain-lain [2015] MLJU 2177; [2015] 9 CLJ 197, CA (refd)
Perkayuan Oks No 2 Sdn Bhd v Kelantan State Economic Development Corp [1995] 1 MLJ 401, FC (refd)
Syarikat Tingan Lumber Sdn Bhd v Takang Timber Sdn Bhd [2003] 2 MLJ 495, CA (refd)
Tan Kim Chuan v Chandu Nair [1991] 2 MLJ 42, SC (refd)
Tycoon Realty Sdn Bhd v Senwara Development Sdn Bhd [1999] 2 MLJ 696, CA (refd)
United Hokkien Cemetries, Penang v The Board, Majlis Perbandaran, Pulau Pinang [1979] 2 MLJ 121, FC (refd)
Vengadasalam v Khor Soon Weng & Ors [1985] 2 MLJ 449, SC (refd)
Wong Kie Chie & Ors v Kathryn Ma Wai Fong (as the personal representative, executrix and trustee of the estate of the late Wong Kie Nai) & Anor and other appeals [2017] 3 MLJ 350, CA (refd)
Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213; [1983] 1 CLJ 191, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 50, 67, 67(1), 68(1)
Rules of Court 2012 O 18 r 19, O 56 r 2

Appeal from: Civil Appeal No D-03(IM)-22–02 of 2016 (Court of Appeal, Putrajaya)

V Rajadevan (Pang Teck Yaw with him) (Rajadevan & Assoc) for the appellant.
CK Yeoh (Ranjit Singh & Yeoh) for the respondent.

Zainun Ali FCJ:

INTRODUCTION

[1] The appellant, Kempadang Bersatu Sdn Bhd ('Kempadang') was granted leave by the order of this court dated 5 January 2017 to appeal the decision of the Court of Appeal dated 29 August 2016 on the following question:

> Whether an order of a High Court remitting the case back to the Deputy Registrar for damages to be reassessed is a final order which is appealable.

FACTS

[2] The respondent, Perkayuan OKS No 2 Sdn Bhd ('Perkayuan') entered into an agreement with the Kelantan State Economic Development Corporation ('KSEDC') on 24 December 1981 ('first KSEDC agreement'), whereby Perkayuan was granted the right and privileges to fell and log and remove timber from the concession area.

[3] However on 12 December 1998, KSEDC terminated the first KSEDC agreement on grounds that Perkayuan had breached cl 18 of the same. Perkayuan filed a suit against KSEDC via Civil Suit No 21–1 of 1989. The High Court dismissed Perkayuan's action.

[4] However, by an order of the Federal Court dated 24 February 1995, the first KSEDC agreement was revived (see *Perkayuan Oks No 2 Sdn Bhd v Kelantan State Economic Development Corp* [1995] 1 MLJ 401).

[5] Consequently, Perkayuan entered into an agreement with KSEDC dated 26 September 2002 ('the second KSEDC agreement').

[6] In the meantime, Perkayuan entered into two agreements with Kempadang dated 3 April 1987 and 24 May 1988. Perkayuan engaged Kempadang as a contractor to fell logs and remove timber from the contract area.

[7] A dispute arose, when Kempadang got wind off Perkayuan's contract with a third party contractor to carry out logging in the timber concession area. It was contended by Kempadang that based on the 1987 and 1988 agreements, the contract work belonged to them (Kempadang).

[8] Kempadang then filed the present action against Perkayuan for, inter alia, a declaration that Kempadang had the right to carry out logging in the timber concession area and that the agreement entered between Perkayuan and the third party contractor was void.

[9] On 7 July 2010, after a full trial, the High Court judge gave judgment in favour of Kempadang and ordered that damages be assessed. The deputy registrar awarded damages in the sum of RM303,627.10 to be paid by Perkayuan to Kempadang.

[10] Perkayuan filed an application to set aside the order of the registrar on damages, which was then dismissed by the deputy registrar. On appeal to the judge-in-chambers, the learned High Court judge affirmed the deputy registrar's decision. Perkayuan then took a further appeal to the Court of Appeal.

The Court of Appeal order dated 22 March 2012

[11] By an order dated 22 March 2012, the Court of Appeal allowed Perkayuan's appeal in part and set aside the orders granted by the trial judge as per para 21(a)–(g) of Kempadang's statement of claim. The court agreed with the finding of the trial judge that Perkayuan was in breach of the 1988 agreement when it entered into an agreement with the third party. However the orders granted by the trial judge as per para 21(a)–(g) of the statement of claim were found to be inappropriate since the third party had acquired rights to fell log in the remaining area for logging. In lieu of the prayers in para 21, the Court of Appeal granted damages to Kempadang, to be assessed based on the acreage and land for logging, having regard to cl 6 of the 1988 agreement on expenses and profits only. Of significance is minute 3 of the order of the Court of Appeal which reads:

> Responden menaksirkan gantirugi hanya berdasarkan pada keluasan kawasan dan pembalakan di bawah Perjanjian Lesen Pembalakan bertarikh 24.12.1981 dan Perjanjian Lesen Pembalakan bertarikh 26.9.2002 dan hanya berdasarkan kepada perbelanjaan dan keuntungan seperti yang diperuntukkan di bawah Klausa 6 Perjanjian Lesen Pembalakan bertarikh 25.5.1988.
>
> Translation:
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> The Respondent (Kempadang) is to have its damages assessed based on the logging area pursuant to the KSEDC Agreement and Second KSEDC Agreement and based only on the expenditure and profit as provided for in clause 6 of the KSEDC Agreement

Assessment of damages

[12] Following minute 3 of the order of the Court of Appeal, the matter reverted to the Deputy Registrar of the High Court for assessment of damages. On 18 October 2015, the deputy registrar dismissed Kempadang's claim for damages on the ground that damages had not been proven. Aggrieved, Kempadang appealed to the judge-in-chambers.

DECISION OF THE LEARNED JUDICIAL COMMISSIONER ('JC')

[13] On 26 January 2016, the learned JC allowed Kempadang's appeal and set aside the decision of the deputy registrar on damages. The learned JC held that the deputy registrar failed to abide by minute 3 of the Court of Appeal, which granted damages to Kempadang, which by the same token, failed to observe the principle of stare decisis. As a result, the learned JC ordered that Kempadang's damages be assessed again before a different deputy registrar. Aggrieved, Perkayuan appealed to the Court of Appeal.

DECISION OF THE COURT OF APPEAL

[14] Before the Court of Appeal, counsel for Kempadang raised only one issue to oppose the appeal ie that the learned JC's order was not a final decision as defined by s 3 of the Courts of Judicature Act 1964 ('the CJA') and was therefore not appealable. Kempadang said that the learned JC's order was a ruling and that a ruling is not a court decision since it does not finally dispose the rights of parties and thus it is non-appealable. However, the Court of Appeal disagreed with Kempadang's argument and held that the appeal was competent, ie the learned JC's order was appealable.

[15] On the merits of the appeal, the Court of Appeal allowed Perkayuan's appeal, set aside the learned JC's order and awarded nominal damages of RM10,000 to Kempadang. It also held that Kempadang had been given the opportunity to produce its evidence at the hearing of the assessment of damages yet it failed to prove the amount of damages claimed. Therefore the learned JC had no basis in making an order for reassessment of damages. In the circumstance the learned JC ought to have granted Kempadang nominal damages.

THE APPEAL BEFORE THE FEDERAL COURT

[16] Referring to the question of law posed before this court, the issue in the appeal lies in the construction to be given to sub-s 67(1) of the CJA. The said provision confers on the Court of Appeal jurisdiction to hear and determine civil appeals from any judgment or order of the High Court made in the exercise of its original or of its appellate jurisdiction.

[17] Subsection 67(1) of the CJA reads:

> 67 Jurisdiction to hear and determine civil appeals
>
> (1) The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought.

THE APPELLANT'S SUBMISSION

[18] The thrust of Kempadang's argument is that the words 'judgment' and 'order' in s 67 of the CJA are to be read in the light of s 3 of the CJA.

[19] The relevant provision of s 3 reads:

> 'decision'
>
> means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties;

[20] Applying s 3 of the CJA to the issue at hand, counsel for Kempadang contended that the decision of the learned JC ordering damages to be reassessed before a different deputy registrar is not one which finally disposes of the rights of the parties. This renders the decision non-appealable. The following authorities were cited in support: *Datuk Seri Tiong King Sing v Datuk Seri Ong Tee Keat & Anor* [2015] 1 MLJ 847; *Christopher ak Bandi @ Josny v Tumbung ak Nakis & Anor (Jamil bin Sindi, third party)* [2016] 4 MLJ 100.

THE RESPONDENT'S SUBMISSION

[21] However counsel for Perkayuan took the position that the absence of the word 'decision' in sub-s 67(1) of the CJA renders s 3 inapplicable; that the words 'judgment' and 'order' in s 67 of the CJA are specific words and ought not be read within the context of 'decision' in s 3 of the CJA.

[22] It was further submitted that the meaning of the word 'decision' in s 3 of the CJA only applies to criminal appeals. Unlike sub-s 67(1), s 50 of the CJA specifically states that 'in respect of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any *decision* made by the High Court ...'. (Emphasis added.)

[23] Perkayuan cited the decision of the Court of Appeal in *Tycoon Realty Sdn Bhd v Senwara Development Sdn Bhd* [1999] 2 MLJ 696 where NH

Chan JCA held that:

> It is to be noted that the word 'decision' is not used in s 67(1), so that, there is no compelling reason to refer to s 3 of the Act for its meaning as is in the case of criminal appeals. That being so, the Court of Appeal has jurisdiction to hear appeals 'from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction'. The phrase 'from any judgment or order' is not to be restricted to the meaning given to the word 'decision' in the current version of s 3. This is because, in s 67, civil appeals to the Court of Appeal are from 'any judgment or order' of any High Court, whereas, in the case of criminal appeals they are against 'any decision' made by the High Court. There is no compelling reason to extend the meaning of the words 'any judgment or order' to mean a judgment or order which would finally dispose of the rights of the parties. It is not the business of a court of law to put words into a statutory provision which are not there because to do so would be intruding into the domain of the Legislature.

[24] It was further submitted that the word 'decision' in s 3 of the CJA was amended by the Legislature via Amendment Act A1031 in 1998. Accordingly, if the Legislature intends for the amendment to apply to civil appeals, sub-s 67(1) would have to be amended. Otherwise, to apply s 3 to s 67(1) would clearly be to add words into a statutory provision which is not the duty of the court.

OUR DECISION

Construction of sub-s 67(1) of the CJA

[25] Subsection 67(1) is a general provision conferring jurisdiction on the Court of Appeal to hear and determine appeals against the decision of the High Courts. It states that 'any judgment or order' of the High Court which is made in the exercise of its original or of its appellate jurisdiction is appealable. However this right of appeal is always subject to any statutory provisions in the CJA or other statutes limiting appeals. On this basis, the provision of s 67(1) of the CJA is to be read together with the provisions in the CJA and other statutes which impose terms and conditions of an appeal.

[26] Civil matters which are not appealable to the Court of Appeal are listed in sub-s 68(1). For instance, there can be no appeal against a judgment or order made by consent of parties or a judgment or order which has been declared final by a statute. Another restriction to appeal can be discerned from the provision of s 3 of the CJA when it qualifies the word 'decision' as opposed to a 'ruling' of the court.

[27] Section 3 is not a specific provision limiting appeals. Section 3 is the

interpretation section of the CJA. It merely defines what a decision is, for the purpose of the CJA.

[28] On the interpretation of the word 'decision', the relevant paragraph in s 3 is divided into two parts. The first part identifies 'decision' in the form of 'judgment, sentence or order' of the court. It provides an extensional definition of the word decision by listing instances of the set of things included therein. In other words the concept of decision is not explained but the objects that fall under this word are listed.

[29] The second part of the paragraph qualifies that these forms of decision do not include '*any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties*'. It is noted that the second part was inserted in s 3 by Act A1031 which came into effect on 31 July 1998. Based on the said provision, at what juncture a ruling is issued plays a vital role in determining whether such an order is a ruling within the context of s 3. There must be a trial in existence or a hearing and that the order is issued in the course of that trial or hearing. Secondly, the ruling must not have the effect of disposing the final rights of the parties. (Emphasis added.)

[30] As regards the application of s 3 of the CJA, counsel for Perkayuan contended that s 3 applies to criminal appeals but not to civil appeals. The reason is that, unlike sub-s 67(1) of the CJA, the word 'decision' appears in the provision of s 50 of the CJA, on the appellate jurisdiction of the Court of Appeal to determine criminal appeals.

[31] In the absence of the word 'decision' in sub-s 67(1) of the CJA, the question is whether the phrase 'judgment or order' mentioned in sub-s 67(1) of the CJA is a 'decision' within the context of s 3 of the CJA. Putting it in another way, the question is whether the exception provided in s 3, which excludes a 'ruling' from the meaning of decision, should be extended to s 67(1), thus restricting any appeal to be filed against any ruling of the High Court?

[32] It bears repeating that the words 'judgment' and 'order' are not defined in s 3 of the CJA. Nevertheless they appear in s 3, to form the meaning of 'decision'. The omission of the word 'decision' in sub-s 67(1) of the CJA is capable of being understood. Section 3 says that 'decision' means 'judgment, sentence or order ...'. It is seen that by the words 'judgment' and 'order', sub-s 67(1) indicates the form a 'decision' will take in s 3 of the CJA where the word 'sentence' is absent. This is appropriate since, a civil court does not impose a sentence in its decision. A sentence is a decision given by a judge sitting in a criminal court upon conviction of a criminal charge. Thus the words in sub-s 67(1) are clear and unambiguous and the court must give effect to its meaning.

[33] The relationship between s 3 on the meaning of the word 'decision' and the provisions on appeals in the CJA is apparent when one looks at the purpose of the amendment made by Act A1031 to the definition of the word 'decision' in s 3.

[34] The courts have always been inclined to take a purposive and literal construction of a provision in a statute. In this regard, the literal meaning of an Act will be given where that meaning is in accordance with the legislative purpose (see the decisions in *Tan Kim Chuan v Chandu Nair* [1991] 2 MLJ 42, *United Hokkien Cemetries, Penang v The Board, Majlis Perbandaran, Pulau Pinang* [1979] 2 MLJ 121; *Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35; *Vengadasalam v Khor Soon Weng & Ors* [1985] 2 MLJ 449).

[35] The same principle has been reiterated by the Federal Court recently, in the case of *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2018] 2 MLJ 590. Balia FCJ, held that:

> The function of a court when construing an Act of Parliament is primarily to interpret the statute in order to ascertain what the legislative intent is. And this is primarily done by reference to the words used in the provision.

[36] The intention of the Legislature when drafting the amendment to s 3 was that the amendment should serve as a filter process for appeals. It must be emphasised that for this purpose, s 3 is intended to be read together with sub-s 67(1) of the CJA.

[37] This is evident from the explanatory statement to the Bill of Act A1031 which reads:

> 2. Clause 2 seeks to amend section 3 of Act 91.
>
> At the moment, in the course of hearing a case, if the court decides on the admissibility of any evidence or document, the dissatisfied party may file an appeal. If such appeal is filed, the court has to stop the trial pending the decision of the appeal by the superior court. This cause a long delay in the completion of the hearing, especially when an appeal is filed against every ruling made by the trial court. The amendment is proposed in order to help expedite the hearing of cases in trial courts.

[38] The position on the amended s 3 of the CJA has been clearly set out in the decision of the Federal Court in the case of *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2010] 6 MLJ 585; [2010] 9 CLJ 625 (see also *Ahmad Zubair @ Ahmad Zubir bin Hj Murshid v Public Prosecutor* [2014] 6 MLJ 831).

[39] In the case of *Dato' Seri Anwar Ibrahim* at p 595 (MLJ); p 636 (CLJ) the court pointed out the underlying reasons for the amendment to the definition of 'decision' in s 3 of the CJA which came into effect on 31 July 1998 in the following manner:

> The underlying reason behind the amendment to the definition of 'decision' in s 3 of the CJA is to stop parties from stalling a trial before the trial court by filing appeal after appeal on rulings made by the trial court in the course of a trial. Apart from that, the definition of 'decision' by itself is sufficiently clear and it is the court's duty to give effect to the same. Justice demands that cases should move without unnecessary interruption to their final conclusion. That is what the amendment seeks to achieve as evident from the explanatory statement to the Bill which reads:
>
> 2. Clause 2 seeks to amend section 3 of Act 91.
>
> At the moment, in the course of hearing a case, if the court decides on the admissibility of any evidence or document, the dissatisfied party may file an appeal. If such appeal is filed, the court has to stop the trial pending the decision of the appeal by the superior court. This cause a long delay in the completion of the hearing, especially when an appeal is filed against every ruling made by the trial court. The amendment is proposed in order to help expedite the hearing of cases in trial courts.
>
> Quite apart from the explanatory statement to the Bill the definition of 'decision' by itself, to our mind, is sufficiently clear, and it is the duty of the court to give effect to the same. Justice demands that cases should move without unnecessary interruption to their final conclusion. That is what the amendment seeks to achieve. The right of a party who is aggrieved by a ruling, after all, is not being compromised, as the party can always raise the issue during the appeal, if any, to be filed after the trial process is brought to its conclusion.

[40] At this juncture, it is noted that the decision of the Court of Appeal in *Tycoon Realty Sdn Bhd* which was relied on by Perkayuan failed to give regard to the purposive and literal construction of sub-s 67(1) and s 3 of the CJA.

[41] It is also noted that the case of *Pentadbir Tanah Kuala Selangor lwn Maybank Islamic Berhad (Menteri Besar Selangor, pencelah) dan lain-lain* [2015] MLJU 2177; [2015] 9 CLJ 197 cited by the Court of Appeal in the present appeal is of no assistance.

[42] Thus apart from the provision of sub-s 67(1) of the CJA, it is apparent that Perkayuan's appeal against the order of the learned JC is an appeal against a decision made by a judge-in-chambers which is governed by O 56 r 2 of the Rules of Court 2012 ('the RC 2012'). The relevant provision reads:

> Appeal from Judge (O 56 r 2)
>
> Subject to section 68 of the Courts of Judicature Act 1964, a party may appeal to the

Court of Appeal against any *judgment, order or decision* made by a Judge in Chambers.

[43] The word 'decision' is expressly stated in O 56 r 2 of the RC 2012 together with the words 'judgment' and 'order'. The definition of the word 'decision' in O 56 r 2 is not provided in the RC 2012. Generally the powers of the courts mentioned in the RC 2012 are conferred by the provisions provided in the CJA. Thus, in interpreting the word 'decision' in O 56 r 2 of the RC 2012, resort must be had to the meaning given to the word 'decision' in s 3 of the CJA.

[44] In view of the above, we are unable to agree with the approach taken by learned counsel for Perkayuan, that the scope of a 'decision' in s 3 is excluded from sub-s 67(1) of the CJA. Subsection 67(1) of the CJA must be read together with s 3 of the CJA.

Whether the decision of the learned JC ordering damages to be reassessed before a different registrar is appealable?

[45] The thrust of Kempadang's argument is that, applying s 3 of the CJA, the decision of the learned JC in ordering damages to be reassessed is not a ruling which finally disposes the rights of the parties, thus rendering the decision non-appealable.

[46] However, much emphasis was placed on this argument thus overlooking the question of at what juncture was the learned JC's order made? It is critical to note that when scrutinising the word 'ruling' in s 3 of the CJA, it is important to examine at what juncture an order is made. This and the effect of such order is to be read conjunctively.

[47] If an order was not made in the course of a trial or matter, regardless of the fact that it does not dispose of the rights of the parties, such an order is not a ruling as defined in s 3 of the Act and is therefore appealable. This was decided by the Court of Appeal in the case of *Syarikat Tingan Lumber Sdn Bhd v Takang Timber Sdn Bhd* [2003] 2 MLJ 495. On the facts of the case, the Court of Appeal held that an appeal against the ruling of the registrar on the admissibility of certain documents in the course of a hearing for assessment of damages is incapable of appeal.

[48] The Court of Appeal in the case of *Datuk Seri Tiong King Sing v Datuk Seri Ong Tee Keat & Anor* [2015] 1 MLJ 847 had emphasised on the requirement of a ruling made in the course of a trial under s 3 of the CJA. In that case, during the trial of a defamation suit, a witness refused to disclose the identity of the 'sources' referred to in the defamatory article. As a result, the

plaintiff made an application for an order to compel the witness to disclose the names and particulars of the 'sources'. The High Court judge dismissed the plaintiff's application. Aggrieved, the plaintiff appealed against the High Court's decision. The Court of Appeal held that the plaintiff's appeal was incompetent and thus non-appealable. It held that:

> An important point which must not be overlooked is that encl 35 was filed and then determined by the learned High Court judge during the course of the trial, even as Joseph Sipalan was in the midst of giving his testimony. Viewed in this way, the fact that a formal application was filed should not make any difference to the matter at hand. *What is of greater significance is at what juncture the said ruling was made?* We agree with the submissions of learned counsel for Joseph Sipalan and the fourth defendant that in substance what was sought was a ruling by the learned High Court judge in the course of the trial as to whether Joseph Sipalan should be compelled to disclose the identity of the 'sources'. (Emphasis added.)

[49] In *Wong Kie Chie & Ors v Kathryn Ma Wai Fong (as the personal representative, executrix and trustee of the estate of the late Wong Kie Nai) & Anor and other appeals* [2017] 3 MLJ 350, the Court of Appeal held that a recusal order made by the judge before the commencement of trial is not a ruling within s 3 of the CJA, and is thus appealable.

Vernon Ong JCA held that:

> [43] According to the appeal record, the parties appeared before the learned judge on 18 January 2016 for the conduct of the cross-examination proceedings. After the parties had introduced themselves and before the commencement of the proceedings the learned judge made his recusal order. Clearly, the recusal order was not made in the course of the trial or hearing within the meaning of s 3 of the CJA 1964. We are fortified in our view in that an order to that effect was subsequently drawn up and sealed by Senior Assistant Registrar of the High Court, Sibu. Accordingly, we hold that this court have the jurisdiction to hear and determine the appeals pursuant to s 67(1) of the CJA 1964.

[50] However it must be stated that not all orders given by the court pursuant to interlocutory applications filed by parties in the course of trial are non-appealable. In *Mulpha International Bhd & Ors v Mula Holdings Sdn Bhd & Ors and other appeals* [2017] MLJU 445, it was held that the decision of the trial judge dismissing an application to strike out pleadings under O 18 r 19 of the Rules of Court 2012, was not a ruling within the context of s 3 of the CJA although such application was filed in the course of the trial.

[51] On this issue, the Court of Appeal applied a purposive approach in interpreting the phrase 'in the course of trial or hearing' provided in s 3 of the CJA. Upon a perusal of the explanatory statement to the Bill of Amending Act A1031, the court concluded that the amendment made to s 3 of the CJA

sought to overcome the delay in the completion of a trial as a result of appeals filed against rulings of a trial judge with respect to admissibility of 'any evidence or document'.

[52] It was then held that the word 'ruling' in the context of s 3 of the CJA is to be limited to an objection raised by a party in the course of trial with regard to the admission of any evidence or document.

[53] Abdul Rahman Sebli JCA in *Mulpha Trading* held that:

> The word 'ruling' appearing in s 3 of the CJA is not defined but in our view it refers to any ruling made in the course of a trial upon objection raised by any party to the proceedings. An example would be an objection to the admissibility of any evidence or document.
>
> [17] A decision by the trial judge to either uphold or overrule the objection would be a 'ruling made in the course of a trial or hearing of any cause or matter *which does not finally dispose of the rights of the parties*'. Such decision is not a 'judgment' or 'order' within the meaning of s 67(1) read with s 3 of the CJA and is therefore not appealable. On the other hand, a decision made pursuant to an application under O 18 r 19 of the Rules is not such 'ruling'.
>
> [18] The rationale behind the amendment to the meaning of the word 'decision' in s 3 of the CJA was explained by Arifin Zakaria CJ (Malaya) (as he then was) in *Dato' Seri Anwar Ibrahim v PP* [2010] 6 MLJ 585; [2010] 9 CLJ 625 in the following terms at p 595 (MLJ); p 636 (CLJ):
>
> > [24] The underlying reason behind the amendment to the definition of 'decision' in s 3 of the CJA, introduced by Amendment Act A1031 of 1998, which came into effect on 31 July 1998 is to stop parties from stalling a trial before the trial court by filing appeal after appeal on rulings made by the trial court in the course of a trial. This is what the amendment seeks to achieve as evident from the explanatory statement to the Bill ...

[54] It is noted that in *Christopher ak Bandi*, the Court of Appeal held that an application to amend pleadings filed in the course of a trial is a ruling within the context of s 3 and is thus non-appealable. It was held that one needs to merely look at the provision of s 3 of the CJA with respect to the two requirements of a ruling which renders it non-appealable.

[55] Nevertheless, the decision of the court in *Christopher ak Bandi* must not be overstated. At the risk of repetition, the facts in *Christopher ak Bandi* involved an application made by the plaintiff to amend its pleading in the course of trial. On this, the decision of the Court of Appeal was also made in the light of a recent decision of the Federal Court in *Hong Leong Finance Bhd v Low Thiam Hoe and another appeal* [2016] 1 MLJ 301; [2015] 8 CLJ 1, which displaces the principles enunciated in *Yamaha Motor Co Ltd v Yamaha*

Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213; [1983] 1 CLJ 191, on amendment of pleadings, if such application is made at a later stage of proceedings.

[56] In *Christopher ak Bandi*, David Wong Dak Wah JCA, held that:

> [16] In our deliberation, we also find the recent decision of the *Hong Leong Finance Bhd v Low Thiam Hoe and another appeal* [2016] 1 MLJ 301; [2015] 8 CLJ 1 to be of some significance and valuable guidance ...
>
> [19] Reverting to the matter before us, to concede to the contention that the appeal before us is appealable, in our view, would no doubt give a party an extra bullet, so to speak, to delay an expeditious trial and would also be inconsistent to the jurisprudence of the present regime of civil procedure. As pointed out by the learned Chief Judge of Malaya, the Rules of Court 2012 now provides robust pretrial case management by the courts before the trial is set down. The philosophy behind the new regime of civil procedure is simply to attend a 'just, expeditious and economical' disposal of an action. Litigants through their respective counsel must understand that they must put their house in order before a case goes to trial and once the trial commenced courts will not tolerate any delay except in the most exceptional circumstance. Putting one's house in order simply means that parties and their counsel must be aware that they have a duty to frame their case fully in all their causes of action and defences prior to the start of trial. Conducting one's case by instalment must not be allowed in the context of the present regime of civil procedure. It is an undeniable fact that many cases had been stayed pending appeals to higher courts on matters similar to the factual matrix in this case, which undoubtedly had delayed the disposal of these cases.

What then is the exact nature of the learned JC's order?

[57] Reverting to the facts of the present appeal, the order of the learned JC, remitting the matter to a different Registrar of the High Court for reassessment of damages was issued at the end of the hearing of Kempadang's appeal. It was not issued in the course of the hearing of the appeal. The order of the High Court dated 26 January 2016, shows that after hearing both parties, the learned JC proceeded to dispose Kempadang's appeal and set aside the decision of the registrar dated 18 October 2015 on assessment of damages.

[58] In view of the above, the order of the learned JC, remitting the matter to the Registrar of the High Court for reassessment of damages is not caught by the exclusion clause of the word 'decision' in s 3 of the CJA and is therefore appealable.

[59] At this juncture we would agree with the finding made by the Court of Appeal that the learned JC ought to have allowed Kempadang's appeal in part by awarding nominal damages. Zamani A Rahim JCA held that:

It is obvious that the learned JC concurred with the deputy registrar that the plaintiff has failed to discharge its burden of proving the loss suffered as emphasised above. The learned JC was troubled by the fact that the deputy registrar did not award any amount of damages despite minute 3 of the order of this court, which to the learned JC thought that the plaintiff was entitled to some. In fact, the learned JC felt that at least nominal damages ought to have been awarded.

Instead of allowing the appeal in part by awarding nominal damages, the learned JC clearly erroneous when he ordered that the deputy registrar's order dated 18 October 2015 be set aside and damages to be assessed before different deputy registrar ...

In this respect, it is trite law that no new trial ought to be ordered unless the appellant in question had succeeded in making out a case of manifest injustice (see *PCRML Letchumanan Chettiar v ALS Sadayappa Chettiar* [1953] 1 MLJ 35).

In addition to the above, a new trial is undesirable and ought not to be ordered unless there is something crucial to a just decision in the case that can be established in the new trial but cannot be established on an assessment of the evidence. If the evidence are already before the court, such an order would not be granted (see *Tan Ah Tong v Gee Boon Kee & Ors* [2006] 2 MLJ 618).

CONCLUSION

[60] In view of the above, the order of the learned JC remitting the case to a different deputy registrar for damages to be reassessed was not a ruling as described in s 3 of the CJA. Thus Perkayuan's appeal against the decision of the learned JC was competent and properly brought before the Court of Appeal in view of sub-s 67(1) and s 3 of the CJA.

[61] The question in the appeal is answered in the affirmative. The appeal is dismissed with costs.

Leave question answered in the affirmative unanimously and appeal dismissed.

Reported by Ashok Kumar